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Supreme Court of the United States

OCTOBER TERM, 1963

No. 138

WILLIAM MURPHY and JOHN MOODY, SR.,
Petitioners,

vs.

THE WATERFRONT COMMISSION OF NEW YORK HARBOR,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

RESPONDENT'S BRIEF

WILLIAM P. SIRIGNANO,
General Counsel of the Waterfront Commission of New York Harbor,
Attorney for Respondent,
15 Park Row,
New York 38, N. Y.

Of Counsel:

IRVING MALCHMAN,
Assistant to the General Counsel.

Dated: February, 1964

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Statement

The First Contempt Proceedings

The American Export Lines, Inc. which leases and operates waterfront piers and a terminal in Hoboken, New Jersey, employed one James H. Markley to be its Chief Security Officer in the port of New York, including Hoboken. The employment of James H. Markley commenced May 16, 1960. Prior to the commencement of his employment with American Export Lines, James H. Markley was an investigator for the Waterfront Commission and his principal assignment for the Commission

had been to cover said piers and terminal of American Export Lines, Inc., in Hoboken (R. 5).*

On Monday, May 16, 1960, Markley, pursuant to his duties, walked onto the piers of the American Export Lines in Hoboken. Thereupon, the longshoremen and checkers employed by the American Export Lines in Hoboken walked off the piers. This work stoppage, except for the morning of Tuesday, May 17, 1960, continued through Friday, May 20, 1960. The work stoppage was in effect during the times that Markley, pursuant to his duties, was on the piers of the American Export Lines in Hoboken. Since May 20, 1960, when the work stoppage ended, and as of November 1, 1961 (the date of the Commission's contempt motions herein) Markley had not set foot on the piers of American Export Lines in Hoboken (R. 6).

Under the Waterfront Commission Act, the longshoremen and checkers who participated in this work stoppage are required to be and are registered by the Waterfront Commission (New York McKinney's Unconsolidated Laws, 9827, 9918; New Jersey Statutes Annotated, 32:23-27, 32:23-105). Also, under the Waterfront Commission Act, James H. Markley, as Chief Security Officer of American Export Lines, must be and is licensed by the Commission as a port watchman (New York McKinney's Unconsolidated Laws, 9839; New Jersey Statutes Annotated, 32:23-39) (R. 6).

The Commission had information that the work stoppage in May, 1960 was a concerted effort to keep James H. Markley off the piers of the American Export Lines in Hoboken, New Jersey. Accordingly, in order to determine whether this work stoppage constituted an illegal

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* The Commission's verified motions to punish petitioners for contempt set forth the purpose of the Commission's investigation, i.e., the fact of the work stoppage and the information possessed by the Commission respecting such work stoppage (R. 3-13).

coercion of an employer (the American Export Lines) to compel such employer to limit the functions of, or to discharge, a licensed port watchman (James H. Markley) and further to determine whether any persons registered or licensed by the Commission were participating in such illegal coercion, the Commission instituted the present investigation (R. 6).

In connection with such investigation, subpoenas of the Commission were duly served on May 18, 1960, upon the petitioners, William Murphy, the business agent of Local 2 of the International Longshoremen's Association, representing longshoremen in Hoboken, New Jersey, and John Moody, Sr., the organizer for the ILA in the State of New Jersey. Both Murphy and Moody appeared at the offices of the Commission in response to these subpoenas on the afternoon of May 19, 1960 (R. 187, 200).

Moody, after giving his name and address, testified that he was a union official and refused to answer any other questions (R. 187-197). Murphy testified that he was a business agent of Local No. 2, and represented members of his local working at the American Export Piers in Hoboken (R. 205). He stated that he knew the pier did not work on Monday (May 16, 1960) and that it was common knowledge for the previous ten days that things were not normal at Piers A, B and C, Hoboken [American Export Lines Piers] (R. 205-207). Murphy then refused to answer whether or not these abnormal conditions were related to the appointment of Markley as Chief Security Officer and refused to answer any further questions (R. 207-211).

The reasons for this first refusal of petitioners to testify comprised the following grounds: (1) the work stoppage was a labor-management dispute or matter which the Commission had no statutory authority to investigate (Moody, R. 188-189; Murphy, R. 203-204); (2) the work stoppage was a matter over which the National Labor Relations

Board had exclusive jurisdiction (Murphy, R. 203-204); (3) the Commission had no right to investigate the work stoppage since civil litigation may have ensued as a result thereof (i.e., the American Export Lines had threatened to sue the ILA) (Moody, R. 189, 197; Murphy, R. 202-203, 208); and (4) the Commission's investigation sought to inquire into privileged communications between union and management or between union representatives (Moody, R. 191). Neither Moody nor Murphy asserted during their first appearance the privilege against self-incrimination, although both were specifically asked if that was one of the grounds for their refusal to testify (Moody, R. 195; Murphy, R. 210).

Thereupon, the Commission instituted contempt proceedings against petitioners in the Superior Court of New Jersey, Hudson County, which, by judgments dated June 20, 1960, adjudged petitioners guilty of civil contempt for their refusals to answer and ordered that they be incarcerated until they obeyed the Commission's subpoena by appearing and testifying. These civil contempt judgments provided for a stay of execution pending appeal upon the posting of bail in the amount of $500 (R. 175). Upon appeal by petitioners, the contempt judgments against petitioners were affirmed by the Supreme Court of New Jersey. *Application of Waterfront Commission of New York Harbor*, 35 N. J. 62 (1961). This Court dismissed petitioners' appeal to this Court and also denied certiorari (368 U. S. 32).

Petitioners' Continued Refusal to Testify After Affirmance of the First Civil Contempt Judgments

Petitioners appeared before the Superior Court of New Jersey, Hudson County, on October 3, 1961 pursuant to the mandate of the Supreme Court of New Jersey affirming the civil contempt judgments against petitioners. The Superior Court directed that petitioners appear at the offices of the Commission pursuant to the Commission's

subpoenas (R. 8). Petitioners did appear at the offices of the Commission on October 3, 1961 as directed by the Superior Court (Murphy, R. 14; Moody, R. 31). However, except to give their names, addresses and occupations, petitioners again refused to answer all questions, this time upon a myriad of entirely new objections, including the privilege against self-incrimination (Murphy, R. 14-31; Moody, R. 31-43). All of these new and multifarious objections were overruled except the privilege against self-incrimination. The subpoenas were adjourned until October 10, 1961 in order to give the Commission an opportunity to determine whether to grant petitioners immunity from prosecution pursuant to the provisions of Section 5-b(5) of the Waterfront Commission Act (New York McKinney's Unconsolidated Laws 9906; New Jersey Statutes Annotated 32:23-86) and, if so, to afford the Commission an opportunity to give the notice required by Section 5-b(5) to the appropriate state law officials (Murphy, R. 26-31; Moody, R. 42-43).

On October 4, 1961, Murphy and Moody appeared again before the Superior Court for the purpose of determining whether they had purged themselves of their contempt. The Superior Court by oral decision rendered from the bench held that petitioners had purged themselves of their contempt, but further made it explicitly clear that the Commission's subpoenas herein still remained in force and effect and that petitioners were still required to appear at the offices of the Commission pursuant to the Commission's subpoenas on October 10, 1961 (R. 44-45). In accordance with such oral decision, the court below signed an order dated October 4, 1961 purging petitioners of their contempt but also providing that petitioners should appear on the adjourned return date pursuant to the Commission's subpoenas (R. 46-47).

On October 27, 1961 (the duly adjourned return date of the Commission's subpoenas) petitioners appeared at the offices of the Commission (Murphy, R. 47; Moody,

R. 72). Pursuant to the provisions of Section 5-b(5) of the Waterfront Commission Act, petitioners were duly granted immunity from prosecution and directed to testify by the Commissioners' designees, Mr. William P. Sirignano, the Commission's General Counsel, sitting for Commissioner David C. Thompson of New Jersey, and Mr. Myles J. Ambrose, the Commission's Executive Director, sitting for Commissioner Harold R. Tyler, Jr. of New York (Murphy, R. 47-72; Moody, R. 72-83). Notwithstanding such grant of immunity from prosecution, petitioners again refused to testify upon multifarious grounds (Murphy, R. 47-72; Moody R. 72-83). For the first time, petitioners indicated that they were relying upon *federal* incrimination as one of their grounds for not testifying, and the Commission thereupon specifically advised petitioners that the Commission's conferral of immunity did not extend to federal crimes (R. 57-58, 73) and that petitioners would be subject to contempt proceedings for their refusal to testify (Murphy, R. 71-72; Moody, R. 82). The Commission then instituted the second and instant contempt proceedings against petitioners to have them adjudged in both civil and criminal contempt for their refusal to testify (R. 1-13).

The Second (and Instant) Contempt Proceeding

The instant (and second) contempt proceedings against petitioners were heard before the Superior Court on November 21, and 22, 1961 (R. 98). At the same time, the Superior Court heard a motion by petitioners to quash the Commission's subpoenas upon the ground of numerous claimed illegalities by the Commission (R. 99-100, 165-167). Petitioners also moved for a bill of particulars and, apparently in the alternative, for interrogatories substantially identical to the bill of particulars (R. 93-96, 100). These discovery motions were exceedingly extensive and sought to compel the Commission in effect to open up for inspection its entire investigative files herein, including,

for example, intra-office communications, as well as communications between the Commission and any United States officials and between the Commission and any state law officers (R. 93-96). Finally, petitioners demanded a jury trial in the event the Superior Court failed to deny the Commission's contempt motions as a matter of law (R. 97, 100).

At the contempt hearing before the Superior Court, petitioners' counsel contended, among other things, that the conferral of immunity from prosecution by the Commission was invalid because it did not extend to federal crimes and that there were many crimes as to which petitioners might incriminate themselves (R. 101-107). The Commission contended, among other things, that petitioners were playing fast and loose with the courts in that in the first contempt proceedings against them petitioners claimed that nothing more was involved than a labor-management dispute which the Commission did not have the power to investigate and now in order to justify their persistent refusal to testify, after the civil contempt judgments against them had been affirmed and after they had been granted immunity from prosecution, petitioners were claiming that all kinds of criminal activity were involved (R. 109-110). The Commission further contended in this connection that petitioners did not show a reasonable basis for apprehension of criminal involvement under federal law and that it was incumbent upon petitioners by the decision of the Supreme Court of New Jersey in *In re Boiardo*, 34 N. J. 599 (1961), to testify, themselves, under oath and thus under penalty of perjury, and to identify the area of federal criminal involvement sufficiently to show that their fear of federal incrimination was reasonable (R. 110). Counsel for petitioners contended that it clearly appeared from the record without testimony from petitioners that petitioners feared federal incrimination; however, counsel offered to put petitioners on the stand if there were any question about petitioners' fear of federal incrimination (R. 111-112). The

Superior Court ruled that petitioners could testify if they desired to do so (R. 117-118). Petitioners then voluntarily took the stand and enumerated the federal crimes as to which they allegedly feared incrimination (Murphy, R. 118-133; Moody, R. 133-140).

By oral decision, the Superior Court rejected petitioners' various legal objections and found that petitioners were guilty of both civil and criminal contempt (R. 143-165). The Superior Court also denied petitioners' various motions (i.e., the motion to quash, the motions for a bill of particulars and interrogatories, and the motion for a jury trial) (R. 165). The Superior Court entered judgments on December 4, 1961 which ordered that petitioners be incarcerated until they answer certain questions specified in the judgments and further fined petitioners $50 each and sentenced petitioners to thirty days in jail (Moody, R. 176-179; Murphy, R. 179-183). The judgments provided for a stay of execution pending appeal upon the posting of bail (R. 179, 183), which was in the amount of $500 (R. 175).

Upon appeal, the Supreme Court of New Jersey, by mandate dated March 4, 1963, affirmed the contempt judgments insofar as such judgments adjudged petitioners guilty of civil contempt and ordered petitioners incarcerated until they answered the specified questions and until they paid a fine of $50 each (R. 240-241). The Supreme Court of New Jersey reversed the contempt judgments with directions for a new trial insofar as such judgments adjudged petitioners guilty of criminal contempt and sentenced petitioners to thirty days in jail (R. 240-241). The ground for the reversal of the criminal contempts by the Supreme Court of New Jersey was that petitioners had made known their desire for an opportunity to introduce evidence on the question of their intent to commit a criminal contempt and that petitioners were exposed to criminal punishment without being afforded "the opportunity to present evidence in their defense, if any, and in extenua-

tion of the offenses charged and in mitigation of the penalties to be imposed" (R. 240). By order dated May 20, 1963, the Supreme Court of New Jersey stayed enforcement of the civil contempts by recalling its mandate pending review by this Court.

Summary of Argument

I

Petitioners cannot validly claim the privilege against federal incrimination because they waived the privilege, because they are estopped from asserting the privilege, and because there is no reasonable basis for their asserted fear of federal incrimination.

A. These questions of waiver, estoppel, and reasonableness are federal questions properly before, and cognizable by, this Court. The decision by the court below (the Supreme Court of New Jersey) that the objections of waiver and estoppel are not available to the Commission because the Commission recognized petitioners' right to claim the privilege against self-incrimination and because the Commission did not assert these objections in the Superior Court (the court of first instance) is not conclusive upon this Court. (The court below did not decide the question of reasonableness.)

1. The record shows that the Commission never recognized a right in petitioners to claim *federal* incrimination and further that the Commission did, in fact, assert the objectons of waiver and estoppel in the Superior Court. In any event, the Commission, as a respondent herein, may urge any ground that appears in the record in support of the civil contempt judgments herein.

2. The questions of waiver, estoppel and reasonableness are federal questions cognizable by this Court because this Court will review or independently determine

all questions upon which a federal right is necessarily dependent.

B. 1. Petitioners, in their original appearance before the Commission in this investigation in May, 1960, stated that they were not claiming the privilege against self-incrimination. Further, petitioners specifically asserted throughout the entire round of litigation involving the first civil contempt judgments that they were not relying upon the privilege. Accordingly, petitioners have waived the privilege against self-incrimination in this investigation.

2. Although the Superior Court held that petitioners had purged themselves of the first civil contempt judgments against them when petitioners pleaded the privilege against self-incrimination upon their appearances before the Commission in October, 1961, after the affirmance of such contempt judgments, the Superior Court further made it explicitly clear that the Commission's subpoenas remained in full force and effect. The successive appearances of petitioners before the Commission in May, 1960 and October, 1961 and the ensuing time lapse between such appearances were unavoidable since they were due solely to an appeal by petitioners. Except for such time lapse, the appearances by petitioners were all in a single proceeding, namely, the same investigation by the Commission pursuant to the same subpoenas in which the Commission was—and still is—seeking to obtain from petitioners answers to the same questions. Hence, the proceedings before the Commission in May, 1960 and October, 1961 were not separate for the purposes of waiver and petitioners' waiver of the privilege against self-incrimination in their appearances in May, 1960 carried over to their appearances in October, 1961.

3. The first time that petitioners indicated they were relying upon federal incrimination the Commission speci-

fically advised petitioners that the Commission's conferral of immunity from prosecution did not extend to federal crimes and further that petitioners would be subject to contempt proceedings for their refusal to testify. Accordingly, the Commission never recognized a right in petitioners to claim *federal* incrimination. Further, the record shows that the Commission objected in the Superior Court that petitioners claimed in the first contempt proceedings against them that nothing more than a labor-management dispute was involved.

C. 1. Petitioners contended in the first contempt proceedings against them that the Commission's investigation constituted an unlawful interference with conduct that was not criminal and that was either affirmatively protected or exclusively governed by federal labor legislation. Such a contention subsumes of course the claim that the work stoppage was free of criminality. Indeed, petitioners specifically stated throughout the first contempt proceedings that no crimes had been committed. After affirmance of the first civil contempt judgment against them petitioners then completely changed their position and asserted that they feared that their testimony would incriminate them under federal law. Petitioners are accordingly estopped from claiming the privilege against self-incrimination.

2. The court below held that the objection of estoppel was not available to the Commission because the Commission had not made this objection in the Superior Court. First, this is an issue which the courts will consider *sua sponte* because the integrity of the judicial process is at stake. Further, the record shows that the Commission did in fact object in the Superior Court that petitioners were making inconsistent claims and were playing fast and loose with the courts.

D. Petitioners' asserted fear of federal incrimination is chimerical. Petitioners *testified* in the Superior Court to

the effect that they feared incrimination under federal penal laws prohibiting theft from interstate commerce or within the special maritime and territorial jurisdiction of the United States. The claim that the work stoppage involved a scheme to commit a theft is completely fanciful. In addition, petitioners also *argue* that they fear federal incrimination under the Hobbs anti-racketeering statute, the anti-trust laws and the Civil Rights Laws. These claims are also fanciful and moreover some of these statutes are mutually exclusive of one another. The fact is that petitioners have taken whatever position has seemed expedient at the moment without any regard for the truth and petitioners' claimed fears of federal incrimination cannot be credited.

II

Petitioners do not have a constitutional right to refuse to testify upon the ground that the Commission grant of immunity from prosecution extended only to state and not to federal crimes.

A. The decision by this court in *Malloy* v. *Hogan* (No. 110 this Term) concerning the applicability of the Fifth Amendment to the States does not control the instant case. This Court has heretofore held in a long line of decisions that the Fifth Amendment does not permit a federal witness to refuse to testify on the ground of incrimination under state laws. Hence, it has never been thought that the Fifth Amendment protects a witness against incrimination under the laws of another jurisdiction. So, even assuming the applicability of the Fifth Amendment to the States, it in no respect follows that petitioners in this case could refuse to testify on the ground that they will be incriminated under federal law, which is an entirely independent question.

B. The Court should adhere in this case to its previous decisions that a state witness who has been granted immunity from state prosecution cannot refuse to testify

upon the ground of federal incrimination. The people of this Country through their duly elected representatives in the State legislatures have made the policy judgment that the efficacy of state investigative powers requires that a state immunity witness should not be excused from giving testimony because of claimed foreign incrimination. Petitioners seek to have the Court override this policy judgment and in effect nullify the state immunity statutes, for it is perfectly plain that a state immunity witness could avoid testifying by the simple expedient of claiming federal incrimination. The immunity statute is a recognized and long-established method of compelling testimony which would otherwise be unavailable and is indispensable to effective law enforcement. Immunity statutes are in force throughout the entire Country. Surely, the Court will be slow in overriding as a violation of due process a policy judgment that has prevailed so widely and for so long among the people of this Country.

The fear of federal prosecution by state witnesses is chimerical. The federal prosecution involved in *Feldman* v. *United States*, 322 U. S. 487, is a legal sport that has never happened before or since. The Court should not anticipate harm to petitioners and reach out gratuitously to decide a constitutional question of fundamental importance. Rather, the time to reach such question is when and if petitioners' testimony is sought to be used against them in a subsequent federal prosecution.

C. If the Court should be of the view that petitioners must be protected against federal incrimination before their testimony may be compelled, then the Court should overrule *Feldman* which permits the use of state immunity testimony in a federal prosecution. This will be the most reasonable accommodation of the competing interests involved in this case. The state witness would be protected and an indispensable tool of law enforcement would be preserved to the States. Further, such an accommodation would be consonant with the constitutional distribution of powers

between the States and the Nation because the primary duty of enforcing criminal justice rests upon the States in our form of federalism.

III

Petitioners' other contentions respecting the within civil contempt judgments (that they were entitled to a jury trial; that they were entitled to a trial on the issue of their good faith; that they were entitled to know what information was contained in the Commission files; and that they were denied the equal protection of the laws) are plainly without substance.

ARGUMENT

POINT I

Petitioners cannot validly claim the privilege against federal incrimination because they waived the privilege, because they are estopped from asserting the privilege, and because there is no reasonable basis for their asserted fear of federal incrimination.

A. The questions of waiver, estoppel, and reasonableness are federal questions properly before, and cognizable by, this Court.

In their original appearances before the Commission in this investigation, petitioners specifically stated that they were not claiming any privilege against self-incrimination. Rather, they contended in the first contempt proceedings against them not only that their conduct was innocent and lawful but that their conduct was affirmatively protected by federal labor legislation. Then, after the court below (the Supreme Court of New Jersey) affirmed the original civil contempt judgments and this Court denied review, petitioners, in a cynical *volte face*, proceeded to claim the privilege against self-incrimination.

The Commission argued in the court below that the claim of federal incrimination was unavailable to petitioners because (a) petitioners had waived the privilege, (b) petitioners are estopped from asserting the privilege, and (c) petitioners had no reasonable basis for their asserted fear of federal incrimination. The court below held (a) that the objection of waiver was not available to the Commission because the Commission had not made this objection in the court of first instance (the Superior Court) and further that the Commission had recognized petitioners' right to claim the privilege (R. 222); (b) that the objection of estoppel was not available to the Commission because the Commission had not made the objection in the court of first instance (R. 222); and (c) that it was unnecessary to decide the question of reasonableness since petitioners did not have a constitutional right to refuse to testify upon the ground of federal incrimination (232).

1. The decision by the court below that the objections of waiver and estoppel were not available to the Commission because the Commission had not asserted these objections in the Superior Court and that the Commission had recognized petitioners' right to claim the privilege is of course not conclusive here. As appears more fully hereinbelow, the record shows that the Commission never recognized a right in petitioners to claim federal incrimination and further that the Commission did assert the objections of waiver and estoppel in the Superior Court. In any event, the Commission, as the respondent herein, may urge any ground that appears in the record in support of the *civil* contempt judgments herein. E.g., *United States* v. *American Ry. Express Co.*, 265 U. S. 425, 435-436; *Langnes* v. *Green*, 282 U. S. 531, 538-539. An "appellee may, without taking a cross-appeal, urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it." *United States* v. *American Ry. Express Co., supra*, at page

435. Indeed, this Court has entertained argument in support of a judgment that was made for the first time upon oral argument in this Court. *Marshall* v. *Pletz*, 317 U. S. 383, 389-390.

2. Moreover, the questions of waiver, estoppel and reasonableness with respect to petitioners' right to claim federal incrimination are federal questions that are cognizable by this Court. For, "This Court will review or independently determine all questions on which a federal right is necessarily dependent." *United States* v. *Pink*, 315 U. S. 203, 217. E.g. *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U. S. 173 (whether patent licensee is estopped from challenging price fixing clause in agreement as being invalid under the Sherman Anti-Trust Act is a federal question). Plainly, the question of when and in what circumstances a claim of federal incriminations based upon the United States Constitution may be asserted is a question that requires uniform treatment and cannot properly be subject to the vagaries of local law. This would particularly be true in the event that the Court should hold in *Malloy* v. *Hogan* (No. 110 this Term) that the self-incrimination clause of the Fifth Amendment is applicable to the States through the due process clause of the Fourteenth Amendment. See *Ker* v. *California*, 374 U. S. 23 (reasonableness of state search and seizure a federal question); *Fahey* v. *Connecticut*, 84 Sup. Ct. 229 (whether introduction of illegal search and seizure evidence in state prosecution was harmless error a federal question).

B. Since petitioners in their original appearance before the Commission specifically asserted that they were not refusing to testify upon the ground of self-incrimination, petitioners have waived the privilege against federal incrimination.

1. In their original appearances before the Commission in this investigation on May 19, 1960, both petitioners

specifically waived the privilege against self-incrimination. Thus, upon petitioner Murphy's original appearance before the Commission on May 19, 1960, the following ensued:

"William Murphy, residing at 218 Roosevelt Street, Union City, New Jersey, appearing as a witness, having been duly sworn, testified as follows:

By Mr. Sirignano:

Q. Mr. Murphy—

Judge Wall: Just a minute.

Pardon me, Mr. Sirignano, would you kindly outline the purpose of this meeting?

Mr. Sirignano: Yes.

Judge Wall: For the purpose of the record.

Mr. Sirignano: This is an investigation pursuant to the powers vested in the Commission in the Waterfront Commission Compact, to determine whether there are any violations of the Waterfront Commission Compact in the pending work stoppage at the Hoboken Piers.

Judge Wall: In a pending work stoppage?

Mr. Sirignano: Yes.

Judge Wall: There are no accusations existing.

Mr. Sirignano: That is an investigation, Judge Wall. At the present time there are no accusations made against any person subject to the jurisdiction of this Commission.

Judge Wall: Now, what I would like to know is: Is this a labor dispute, strictly and purely?

Mr. Sirignano: Mr. Wall, we are conducting an investigation to determine the true nature of this work stoppage.

Judge Wall: To determine the true nature?

Mr. Sirignano: Until we get the facts, we will be unable to determine that." (R. 201-202)

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"Judge Wall: But I don't see where there's any relevancy concerning a labor dispute with this particular Bi-State agency. I think it's an NLRB situation.

Mr. Sirignano: That is what we are asking questions to determine, the true nature of this work stoppage, to see whether it's a labor dispute or whether there's violations of both the criminal law or the compact.

Now, we're not going to know that until we get the facts from all sources and Mr. Murphy is one of the sources.

Judge Wall: Well, there's nothing wrong here, you say, except a work stoppage?

Mr. Sirignano: I didn't say anything of the sort. I don't know if there is anything wrong at this point. We haven't got all the facts yet.

Judge Wall: Is there any basis to hold the investigation and not let this matter go through its proper channels with the National Labor Relations Board? That's a Governmental agency.

Mr. Sirignano: This Commission has the power to conduct an investigation regardless of the authority or the jurisdiction of the National Labor Relations Board if it effects the Compact.

Judge Wall: Provided that they do not infringe upon a man's rights. I mean we have to protect the man's rights.

Mr. Sirignano: That's absolutely right, but the rights you raised are that he is not protected. He is to answer questions or to claim the right of self-incrimination. But if you raise an objection against it because he might be adversely effected in a civil litigation, that is no bar to his testifying here.

Judge Wall: Well, I don't agree with you. I'd like an opportunity to check it.

Mr. Sirignano: A work stoppage is pending. It's a question of finding out what the facts are, as quickly as we can, and if there's some action to be taken, we

have to do it. We cannot delay it any longer. It's already since Monday that it's going on, not yesterday or today.

Judge Wall: Well, if it's a labor dispute, Mr. Sirignano, why not let the NLRB do the job?

Mr. Sirignano: We don't know that yet.

Judge Wall: I don't think you have jurisdiction in this matter. I want to check it.

Mr. Sirignano: Mr. Wall, we may not have jurisdiction ultimately, if the facts show it's just a labor dispute, but on the other hand, we have the jurisdiction to find out what the facts are, and we are having a fact finding investigation.

Judge Wall: You're having a fact finding investigation to see if you have jurisdiction.

Mr. Sirignano: To see if there's any violation of the Compact.

Judge Wall: This is a labor dispute, Mr. Sirignano, and you have no jurisdiction. You're looking for jurisdiction, according to your own statement.

Mr. Sirignano: Mr. Wall, I'm going to ask Mr. Murphy some questions. You can put your objections on the record, as to whether you are going to permit him or advise him to answer the questions or not, and if we feel that after he has taken that position he is in contempt, we'll proceed to contempt. That's the choice you have to make. Either you are going to have to answer the questions or raise a rightful privilege to refuse him to answer, and I assure you he will have to answer.

Judge Wall: I note my objection on the record that this is a pure and simple labor dispute. That the Bi-State does not have any jurisdiction. There are no charges pending here, and it's strictly to find certain facts out, if there are any, if they exist, to obtain jurisdiction. And, that is putting the cart before the horse, in my humble opinion." (R. 203-204)

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"Judge Wall: See—you want to take this off the record? He's threatened with a suit. He's threatened with everything, as usually happens in strike situations, to get it settled. Now, for him to come over here and testify when this should be before the National Relations Board, I don't think it's fair to this man.

Mr. Sirignano: Mr. Wall, what you are saying is just as a man may be sued simply for a criminal act, the criminal prosecution should stop until the civil suit is settled.

Judge Wall: No, there's no crime here.

Mr. Sirignano: We don't know, there may very well be a crime here.

Judge Wall: But you're looking for jurisdiction over something. You don't know if you have it.

Mr. Sirignano: You don't know if there's a crime, only after you collect the facts and investigate." (R. 208)

* * * * * *

"Judge Wall: We have come to the conclusion that there be no further testimony, on the grounds that we question the jurisdiction, and we say this is purely a labor dispute.

Mr. Sirignano: In other words, Mr. Murphy is going to take the position to any questions that I put to him that he refuses to answer on the grounds that the Commission has no jurisdiction to ask these questions; is that correct, sir?

Judge Wall: Has no jurisdiction in this matter at all.

Mr. Sirignano: And, therefore, we cannot ask the questions and we should not expect an answer; is that correct, sir?

Judge Wall: Yes.

Q. Mr. Murphy, is that your position?

A. That's right.

Q. You are going to refuse to answer, on the grounds that the Commission does not have the jurisdiction to conduct this investigation; is that correct, sir?

Judge Wall: In this particular labor dispute.

Mr. Sirignano: In the investigation as related to in this record in the interrogation.

Judge Wall: Coupled with the fact that you yourself said that you do not know whether you are in it or out of it.

Q. Is that correct, Mr. Murphy?

A. That's right.

Q. You do not claim to assert your right against self incrimination, is that correct; sir?

Judge Wall: He doesn't take the Fifth Amendment, no.

Q. Is that right?

Mr. Sirignano: I want it from Mr. Murphy.

A. That's right.

Q. You're not taking the Fifth Amendment, you are not claiming that any of these questions will self incriminate you?

A. No.

Judge Wall: You're not taking the Fifth Amendment?

Mr. Murphy: No.

Q. Mr. Murphy, any future questions that I ask you, you will take that same position?

A. That's right.

Q. Now, for the record, Mr. Murphy, did you have anything to do with causing the strike that is presently pending at the American Export Line?

Judge Wall: He is not answering.

A. I am not answering.

Q. On the same grounds?

A. That's right.

Q. Did you, in any way, participate in this work stoppage to compel the American Export Line to dis-

charge, or to limit the duties of an employee by the name of James Markley?

A. I'm not answering.

Q. On the same grounds?

A. Yes.

Mr. Sirignano: No further questions (3:37 P.M.)." (209-211)

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And in petitioner Moody's original appearance before the Commission on May 19, 1960, the following ensued:

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"Mr. Florio: Prior to the inception of the interrogation, might I ask, for the benefit of myself and on behalf of my client, what the purpose of the investigation is in order that I may so advise Mr. Moody what his rights are.

Mr. Piazza: Mr. Florio, the purpose of the investigation is to ascertain facts surrounding a work stoppage at Piers "A", "B" and "C", Hoboken, New Jersey.

Mr. Florio: Yes.

Mr. Piazza: Fair enough?

Mr. Florio: That's good enough.

Q. Mr. Moody, you are a union official?

A. Yes.

Mr. Florio: Mr. Piazza, now, I am going to make a continual objection on behalf of Mr. Moody: One, this is an investigation proceeding for the record which may in the future become a public document; two, it is the opinion of myself that in this matter it is strictly a matter for labor and management and that the Waterfront Agency has no jurisdiction whatsoever. It is my opinion that the purpose of the Waterfront Commission for the New York and New Jersey Port of Metropolitan Area is solely for the purpose of maintaining peace, safety, protection of crime along the waterfront and on the piers. And

I reiterate that this matter does not come within the jurisdiction of the Waterfront Compact, and in that respect I will advise my client, Mr. Moody, to say nothing at this hearing.

Mr. Piazza: This is not a hearing.

Mr. Florio: Or at this—

Mr. Piazza: This is an investigation.

Mr. Florio: At this interrogation.

Mr. Piazza: This interrogation is for the purpose of collecting facts concerning the work stoppage. Now, do I understand you to state essentially that we are without jurisdiction in this matter since it is a labor dispute?

Mr. Florio: A labor and a management problem as of this moment.

Mr. Piazza: What did you mean by a labor-management problem?

Mr. Florio: That there is an authority called The New York Shipping Association which has full jurisdiction over matters such as these.

Mr. Piazza: Well, I overrule your objection and I direct Mr. Moody to answer the questions when I put them to him." (R. 188-189)

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"Q. Mr. Moody, within the last week have you attended any conferences with the officials of the American Export Line with respect to the work stoppage at Piers "A", "B" and "C" in Hoboken?

Mr. Florio: I object to this question, one, I would state that any communication between any union official or any between management and labor is certainly a privileged one and—

Mr. Piazza: Privileged on what theory?

Mr. Florio: Privileged between management and labor.

Mr. Piazza: On what theory?

Mr. Florio: Privilege between labor and management under the existing contract between the New York Shipping Association and International Longshoremen's Association.

Mr. Piazza: I know of no privilege and I find your objection insufficient and defective of law and I overrule that.

You must answer the question, Mr. Moody. I direct you to answer.

Mr. Moody: I am not answering on advice of my counsel." (R. 191)

* * * * * *

"Mr. Piazza: Mark the appearance of Mr. Sirignano, General Counsel.

By Mr. Sirignano:

Q. Mr. Moody, I understand that you have taken the position that you are not going to answer any questions here; is that correct, sir?

A. That's correct.

Q. Do you understand that we are conducting an investigation to determine whether any violations of the Compact are being committed in connection with the present work stoppage at the American Export Lines at Piers A, B and C in Hoboken? You understand that?

Mr. Florio: He has been so advised, Mr. Sirignano.

Q. And that in connection with that investigation you have been subpoenaed here and you are here pursuant to a subpoena; is that correct, sir?

A. It must be.

Q. And you are represented by counsel?

A. That's right.

Q. And Mr. Piazza has put certain questions to you; is that right?

A. Correct.

Q. Now, you have refused to answer those questions, and what are your grounds, please?

A. On advice of my counsel.

Q. That's not a legal ground. Do you want the counsel to state the grounds for you?

Mr. Florio: I have already made a continuing objection.

Would you read it from the record, please.

Would you note the appearance of two other gentlemen in this room.

Mr. Sirignano: Myles Ambrose, Executive Director and Mr. White, Assistant Counsel.

As I understand, Mr. Florio, your objection to the questions that were asked Mr. Moody is on the grounds that we lack jurisdiction in this matter is that correct? You are not claiming or Mr. Moody is not claiming any rights against self-incrimination; is that correct?

Mr. Florio: Not at this time.

Mr. Sirignano: At this time you are not claiming any such rights?

Mr. Florio: When the question arises and we feel any questions would involve any self-incrimination to Mr. Moody, I will so advise him.

Mr. Sirignano: You are now objecting solely to the jurisdiction of this Commission to conduct this investigation?

Mr. Florio: Right.

Mr. Sirignano: We make note of your objections, Mr. Florio, and we direct Mr. Moody to answer. Now, do you want to proceed with the interrogation? Your objection is on the record. He is directed to answer at this point." (R. 194-195)

A witness may of course waive the privilege against self-incrimination. "If the witness intelligently and unequivocally waves any objection based on the Self-Incrimination Clause, or if the witness refuses a committee request to state whether he relies on the Self-Incrimination Clause, he cannot later invoke its protection in a prosecution for contempt for refusing to answer that question." *Emspak*

v. *United States*, 349 U. S. 190, 195 (held upon the facts that the witness had not relied exclusively upon the First Amendment in refusing to testify but had also invoked the Fifth Amendment). Here, not only did petitioners fail to assert the privilege against self-incrimination but they specifically asserted that they were not relying upon the privilege through an entire round of litigation. It follows ineluctably that petitioners waived the privilege against self-incrimination in this investigation.

2. Petitioners contend that any waiver of their privilege in their first appearance before the Commission on May 19, 1960 does not carry over to their subsequent appearances before the Commission on October 3rd and 27th, 1961. Petitioners contend, rather, that their latter appearances in October, 1961 constituted a separate and distinct proceeding for the purposes of waiver. In this connection, petitioners point to the fact that when they appeared before the Superior Court on October 4, 1961 (after having pleaded self-incrimination but before having been granted immunity) the Superior Court ruled that petitioners had purged themselves of the first civil contempt judgments against them (R. 45).

However, the Superior Court further made it explicitly clear that the Commission's subpoenas remained in force and effect and that petitioners were still required to appear at the offices of the Commission pursuant to the Commission's subpoenas (R. 45). And in accordance with such oral decision the Superior Court signed an order dated October 4, 1961 purging petitioners of their contempt but also requiring petitioners to appear before the Commission pursuant to the Commission's subpoenas (R. 46-47). Indeed, petitioners were unsuccessful in their contention in the court below that the Superior Court had committed error in not holding that the Commission's subpoenas had spent their force and in not requiring the Commission to issue new subpoenas (R. 232-233).

It has been held upon exactly comparable facts that the proceedings were not separate for the purposes of waiver. *United States* v. *St. Pierre*, 132 F. 2d 837 (2nd Cir. 1942), appeal dism'd 319 U. S. 41. In *St. Pierre*, the defendant therein had been convicted of contempt for refusing to testify before a grand jury, and after his conviction had been affirmed by the Second Circuit he was recalled before the same grand jury to answer the same question. Again defendant refused to answer and again the Second Circuit affirmed defendant's conviction for contempt. This decision by the Second Circuit in the *St. Pierre* case is discussed by the Second Circuit in its subsequent decision in *United States* v. *Maranti*, 253 F. 2d 135, 140 (2nd Cir. 1958), as follows:

> ". . . In United States v. St. Pierre, 2 Cir., 132 F. 2d 837, 147 A.L.R. 240, appeal dismissed St. Pierre v. United States, 319 U. S. 41, 63 S. Ct. 910, 87 L. Ed. 1199, defendant had been held in contempt for refusing to answer a question before a grand jury. After we had affirmed his conviction in 2 Cir., 128 F. 2d 979, he was recalled before the same grand jury to answer the same question. Again he refused and again he was held in contempt. In affirming this second conviction we assumed, without discussion, that the proceedings were not separate and that a waiver in the former hearing carried over to the latter. But there the considerable time lapse between the successive proceedings was unavoidable, for it was due solely to the appeal; and except for this time lapse, the case involved a continuing interrogation before the same grand jury for the same purposes. That situation does not exist here, where, for all practical purposes, two separate grand juries investigated unrelated crimes."

Here, as in *St. Pierre*, the successive appearances and the ensuing time lapse were unavoidable since they were

due solely to an appeal by petitioners and, except for such time lapse, the appearances by petitioners were all in a single proceeding, namely, the same investigation by the Commission pursuant to the same subpoenas in which the Commission was—and still is—seeking to obtain from petitioners answers to the same questions.

The decisions in New Jersey are even stronger against petitioners. Thus, when two grand juries had investigated the same subject matter, "a waiver barring their [the defendants therein] right to assert the privilege at their second inquiry may be constructed" when the questions asked before the second grand jury were the same as those answered before the first grand jury without claim of privilege. *State* v. *Fary*, 19 N. J. 431, 440 (1955). And see *State* v. *Decola*, 33 N. J. 335, 340 (1960), also indicating that, if a second grand jury had investigated the same matter as an earlier grand jury, testimony by a witness before the earlier grand jury without claim of the privilege would have constituted a waiver of the privilege before the second grand jury.

3. As noted, the decision by the court below that the Commission had recognized petitioners' right to claim the privilege is in no respect conclusive upon this Court. And in point of fact, the record herein shows that at no time did the Commission recognize a right in petitioners to plead *federal* incrimination.

When petitioners appeared before the Commission on October 3, 1961 after the affirmance of the civil contempt judgments against them, petitioners pleaded the privilege against self-incrimination. The Commission recognized this plea and adjourned the subpoenas in order to give the Commission an opportunity to determine whether to grant petitioners immunity from prosecution pursuant to the provisions of Section 5-b(5) of the Waterfront Commission Act and, if so, to afford the Commission an opportunity to give the notice required by Section 5-b(5) to the ap-

propriate state law officials (Murphy, R. 26-31; Moody, R. 42-43).

During their appearance on October 3, 1961, petitioners did not in any respect indicate that they were relying upon *federal* incrimination and, of course, the Commission only had the power to confer immunity from *state* prosecution. The first time the petitioners indicated that they were relying upon *federal* incrimination was during their appearance before the Commission on October 27, 1961 when petitioners were granted immunity from prosecution and directed to answer (R. 57, 73). The Commission thereupon specifically advised petitioners that the Commission's conferral of immunity did not extend to federal crimes (R. 57-58) and further that petitioners would be subject to contempt proceedings for their refusal to testify (Murphy, R. 71-72; Moody, R. 82). The Commission accordingly never recognized a claim of *federal* incrimination by petitioners.

The court below also held respecting the question of waiver that the Commission had not made this objection in the Superior Court. First, since the Commission appears before this Court as the respondent upon the instant review of the *civil* contempt judgments against petitioners, the Commission, as noted, may urge any ground that appears in the record in support of the judgments herein. Further, and apart from this, the Commission specifically objected in the Superior Court that petitioners were playing "fast and loose" with the Court in that in the first contempt proceedings against them petitioners claimed that nothing more was involved than a labor-management dispute which the Commission did not have the power to investigate and that now, in order to justify their plea of self-incrimination after the affirmance of the first civil contempt judgments against them, petitioners were claiming that all kinds of criminal activities were involved (R. 109-110).

C. Since petitioners contended in the first contempt proceeding that the Commission's investigation constituted an unlawful interference with conduct that was not criminal and that was either affirmatively protected or exclusively governed by federal labor legislation, petitioners are estopped from taking the inconsistent position in this contempt proceeding that their testimony may implicate them in violations of federal criminal law.

As seen, petitioners in their original appearances before the Commission on May 19, 1960 contended that there was no jurisdiction for the Commission's investigation because there were no crimes committed and nothing more than a labor dispute was involved. The Commission's position, on the other hand, was that the Commission could not determine what was involved until it had all the facts, including the testimony of petitioners.

Petitioners persisted in their contention that no crimes were committed and that nothing more than a labor dispute was involved in the contempt proceedings instituted against them by the Commission upon their refusal to testify in May, 1960. Thus, in a signed answer submitted by counsel for petitioner Murphy in the first contempt proceeding, which answer was verified by the petitioner Murphy, himself (R. 198-200), the following was stated (R. 199):

> "5. There does not exist any accusation or charges setting forth a reason for intermeddling in a purely labor situation, in fact, William P. Sirignano, General Counsel and Hearing Officer in the instant matter, so stated at the hearing.
>
> 6. William Murphy appeared, was sworn and answered certain questions, contrary to the allegations as made in Paragraph Thirteen of the Notice of Motion. William Murphy qualified his refusal to an-

swer stating that he was threatened with a suit, that a labor dispute was in progress and he felt that any requirements to answer would deprive him and the members of Local 2 aforesaid, of their rights under the Fourteenth Amendment of the Constitution of the United States, and further, that the Waterfront Commission of the Port of New York had no jurisdiction in the labor problem. In this way, he legally qualified his reasons for not answering the questions asked.

* * *

8. In conclusion, it is apparent that a labor dispute exists under full control of the United States Government, National Labor Relations Board, and to allow the Waterfront Commission of the Port of New York to intermeddle, would lead to the impairment of the existing contractual relationship between Labor and Management."

And, upon their appeal in the first contempt proceeding, petitioners contended, in the words of the court below, as follows: "(1) that the investigation adversely affects or limits 'the right to strike' which is expressly reserved by the Waterfront Commission Act (N.J.S.A. 32:23-68); and (2) that the Commission's power to investigate is in conflict with and therefore pre-empted by the Labor Management Relations Act (LMRA) (29 U.S.C.A. § 141 et seq.)" (35 N. J. 62, 66). In other words, as is made clear in the first opinion herein by the court below (35 N. J. 62), petitioners contended that the work stoppage was a lawful labor strike affirmatively protected by federal labor legislation or, alternatively, a matter within the exclusive purview of the Labor Management Relations Act. Such a contention subsumes of course the claim that the work stoppage was free of any criminality, such as theft from interstate commerce.

In fact, petitioners specifically represented in their brief in the court below the following (R. 185):

> "During the period commencing May 16 and ending May 25, 1960, the Commission does not allege, nor were there any acts of violence committed; there were no pickets, picketing, or demonstrations; no person was assaulted or intimidated; no crimes were committed; no property was damaged; the streets were not blocked or obstructed and traffic in and out of the piers was not impeded."

And upon their appeal to this Court after the affirmance by the court below of the first contempt judgments against them and prior to the grant of any immunity, petitioners represented the following in their jurisdictional statement (pp. 22-23):

> "The question here presented, as to the constitutionality of the Compact as construed and applied in the decision below, is substantial, then, in the most weighty degree. The question is not governed by the DeVeau case [*DeVeau* v. *Braisted*; 363 U. S. 144], as above shown, for here there is not brought into play, either factually or analytically, the crime-prevention features which were decisive in DeVeau; here, rather, the whole realistic brunt of the state police power is upon a traditional type of labor-dispute situation which is not shown by even remotely adequate record proofs to partake of a 'crime' element."

Now, after a judicial determination that there was statutory jurisdiction for the Commission's investigation and after affirmance of the original civil contempt judgments requiring petitioners to testify, petitioners have the temerity to assert that their testimony may incriminate them under federal penal laws. Surely, this kind of intentional self-contradiction will not be countenanced and petitioners

will not be permitted to toy with the courts in this fashion. Petitioners, by litigating all the way to this Court their claim that nothing more was involved herein than a labor dispute which the Commission did not have jurisdiction to investigate, were able to delay this investigation for a year and a half. Cf. *National Association for the Advancement of Colored People* v. *Alabama*, 360 U. S. 240 (in contempt proceeding against NAACP, where this Court's prior decision was based on premise that NAACP had complied with court order to produce documents except as to its membership lists, which was not denied by the State of Alabama, the State of Alabama was bound by this position and could not subsequently claim that the NAACP had failed in other respects to comply with the court order). *Scarano* v. *Central R. Co. of New Jersey*, 203 F. 2d 510, 512-13 (3rd Cir. 1953) (railroad employee who received large settlement after personal injury trial in which he claimed permanent disablement was estopped from subsequently suing for reinstatement to his job with railroad). See the numerous decisions collected in Beck, *Estoppel Against Inconsistent Positions In Judicial Proceedings*, 9 Brooklyn Law Review 245 (1940).

2. The court below held that the objection of estoppel was not available to the Commission because the Commission had not made this objection in the Superior Court (R. 222).

First, this is an issue which not only concerns the parties but in which the courts, themselves, have an interest since the integrity of the judicial process is at stake. The question of estoppel therefore is an issue which the courts may consider *sua sponte*. Further, the Commission appears before this court as the respondent, and accordingly may, as noted, urge any ground that appears in the record in support of the judgments herein. Finally, the Commission specifically objected in the Superior Court that petitioners were taking inconsistent positions and were playing "fast

and loose" with the courts so that the Commission did make this objection in the Superior Court (R. 109-110).

Petitioners in their brief suggest that it is the Commission which has been inconsistent because, according to petitioners, in the first contempt proceedings the Commission emphasized the theme of crime whereas in the instant (and second) contempt proceedings the Commission deprecates petitioners' claim that they fear self-incrimination under federal law. Actually, as appears from the printed appendix in the original contempt proceedings, copies of which are on file with the Court, the Commission's contempt motion in the first contempt proceeding is identical *in haec verba* with the Commission's contempt motion in the second (and instant) contempt proceeding, except that the Commission's second contempt motion relates the events that occurred subsequent to the institution of the first contempt proceedings.

D. Petitioners have no reasonable basis for their asserted fear of federal incrimination.

The work stoppage in this case occurred several years ago in May, 1960. No federal prosecutor in the almost four years that have passed has evinced the slightest interest in this matter. In point of actual fact, petitioners have no reasonable basis whatever for their asserted fear of federal incrimination. (The phrase "reasonable basis" is intended not as any substantive test for determining whether petitioners were justified in their claim of federal incrimination but rather simply as a shorthand reference to the standard laid down in *Hoffman* v. *United States*, 341 U. S. 479, for determining the incriminatory nature of testimony, which standard is assumed here. Since petitioners' fears of federal incrimination are entirely chimerical, petitioners are not justified in refusing to testify under the standard laid down in *Hoffman* irrespective of how that standard may be verbalized.)

Under the decision in *In re Boiardo*, 34 N. J. 599 (1961), it was incumbent upon petitioners herein to pinpoint, under oath and hence under penalty of perjury, the areas of federal criminal involvement which they feared and to establish that their fear of federal incrimination had a reasonable basis. "The area [of incrimination] must be pinpointed to the extent to which it is possible to do so without eliciting a hurtful answer * * *. But it is the witness, and not counsel, who must so state, and must do so under oath, for it is the penalty of perjury which is the sole assurance against a spurious assertion of a claimed apprehension." *In re Boiardo, supra*, 34 N. J. at p. 604.

In accordance with the decision in *Boiardo*, petitioners voluntarily took the stand for the purpose of pinpointing the areas of federal criminal involvement that they feared. (Since petitioners have already voluntarily testified, the question whether *Boiardo* is comportable with federal constitutional standards relating to the privilege against self-incrimination is immaterial.)

Petitioner Murphy testified that he feared incrimination only under a federal penal law prohibiting theft from interstate commerce (R. 132). Petitioner Moody specified three areas as to which he feared incrimination under federal law: (1) thievery, (2) "to compel the company or anybody else that there's got to be certain people to go on there" [the pier]; and (3) "any cargo that comes into the United States on a ship is ICC" (R. 139-140). Answer (2) does not show any area of federal criminal involvement. And by answer (3), petitioner Moody apparently was referring to thefts within the special maritime and territorial jurisdiction of the United States (see petitioners' brief, p. 55). Accordingly, for petitioners' claimed fear of federal incrimination to have any validity, it must rest upon the premise that the work stoppage could reasonably have been some kind of conspiracy to commit a theft.

Petitioners' claim of federal incrimination based upon theft is inherently incredible. It taxes credulity that peti-

tioners would consider it necessary to engage in a general work stoppage involving hundreds of men and lasting four days to remove Markley from the piers simply in order to commit a theft, particularly since a work stoppage would only focus widespread attention upon themselves and, as they doubtless knew, bring Commission investigators to the scene. Moreover, Markley's presence on the piers was nothing new because he had been previously assigned to the same piers as a Commission investigator.

Petitioners' claim that they fear federal incrimination does not of course bind anyone. The "protection [the privilege against self-incrimination] must be confined to instances where the witness has reasonable cause to apprehend danger from a direct answer. Mason v. United States, 1917, 244 U. S. 362, 365, 37 S. Ct. 621, 622, 61 L. Ed. 1198, and cases cited. The witness is not exonerated from answering merely because he declares that in so doing he would incriminate himself—his say-so does not of itself establish the hazard of incrimination. It is for the court to say whether his silence is justified, Rogers v. United States, 1951, 340 U. S. 367, 71 S. Ct. 438, and to require him to answer it if 'it clearly appears to the court that he is mistaken'. Temple v. Commonwealth, 1880, 75 Va. 892, 899." *Hoffman* v. *United States, supra,* 341 U. S. at page 486. Here, we deal with nothing more substantial than the phantasmagoria of petitioners, who certainly have been something less than completely candid in their claims in these contempt proceedings and who are now using the privilege simply as a pretext by which to defeat the Commission's investigation.

Petitioners further assert in their brief (p. 54) that the work stoppage may be incriminatory by virtue of 18 U.S.C. § 1951 (the Hobbs anti-racketeering statute), which would be applicable only if the work stoppage were for the purpose of extortion. However, petitioners' sworn testimony before the Superior Court was that in effect they feared incrimination only for theft.

Petitioners also assert in their brief (p. 54) that they may be incriminated under the federal anti-trust laws. Again, petitioners' sworn testimony in the Superior Court was that in effect they feared incrimination respecting only theft. Moreover, a union violates the federal anti-trust laws only when it executes an agreement with an employer in the suppression of competition. E.g., *Allen Bradley Co.* v. *Local 3, Electrical Workers*, 325 U. S. 797. In the absence of such concerted action between the employer and the union, there can be no violation of anti-trust laws. E.g., *Weir* v. *Chicago Plastering Institute*, 272 F. 2d 883 (7th Cir. 1959). Obviously, here the ILA was not working in cooperation with the American Export Lines to suppress competition. Also, it is difficult to conceive, to say the least, how petitioners can honestly fear incrimination under both a federal law prohibiting theft from interstate commerce or extortion and the anti-trust laws.

Petitioners also assert in their brief (pp. 54-55) that they may be incriminated under the Civil Rights Law, which prohibits any conspiracy to injure or intimidate any citizen in the free exercise of his rights under the Consitution and laws of the United States. Again, petitioners swore in their testimony in the Superior Court that they feared incrimination respecting theft. Moreover, this claim is fanciful since there is no law of the United States assuring Markley the right to be the chief security officer of the American Export Lines. In this connection, it bears note that watchmen are outside the coverage of the Labor Management Relations Act (29 U.S.C. § 159(b)(3)). Plainly, in this litigation, petitioners are simply thrashing about for a federal statute upon which they can hang their claim of federal incrimination without any regard whatever for the truth.

Since it is perfectly plain that the claims by petitioners in this litigation have been made without any regard whatever for the truth, the sincerity of petitioners in their present claim that they fear federal incrimination

is highly suspect, to say the least. Thus, petitioners claimed throughout the first round of litigation that nothing more was involved than a labor dispute which the Commission did not have jurisdiction to investigate. Then, petitioners proceeded to claim incrimination under federal penal laws that are mutually exclusive of one another, such as theft or extortion and the anti-trust laws. And even now, petitioners urge upon the Court as an alternative position herein that the Commission's investigation is an interference with the right to strike (petitioners' brief, pp. 93-94) or an inquiry into areas preempted by the Labor Management Relations Act (petitioners' brief, pp. 86-93). (Since this was not one of the questions presented by petitioners in their petition for certiorari, it is of course not properly before the Court.)

Petitioners ask what incrimination the Commission had in mind when it recognized petitioners' plea of the privilege against self-incrimination. Section 530 of the New York Penal Law makes it a misdemeanor where one person "with a view to compel another person to do or to abstain from doing an act which such other person has a legal right to do or to abstain from doing, wrongfully and unlawfully, uses violence or inflicts injury upon such other person or his family, or a member thereof, or upon his property or threatens such violence or injury." *In re Dolowich*, 246 App. Div. 209, 285 N. Y. Supp. 483 (1st Dept. 1936) (attorney disbarred after conviction under Penal Law, § 530, for his conduct in unlawfully coercing another to become a member of a corporation by threatening to injure and destroy his property). In this connection one of the questions asked petitioners and which they have been directed to answer by the contempt judgments herein is whether they had discussions with any executives of the American Export Lines either in Hudson County, New Jersey or New York County, New York, concerning Markley's employment (R. 178, 182). The possible violation of Section 530 of the New York Penal Law explains the

Commission's reference to the work stoppage in the contempt motion papers as an "illegal coercion" (R. 6). Apart from Section 530 of the New York Penal Law, the Commission does not know of any penal law, state or federal, under which petitioners could have incriminated themselves at the time that the Commission granted petitioners immunity from prosecution in October, 1961.

Finally, petitioners contend that they reasonably fear federal incrimination because there exists a policy of collaboration between the Commission and federal law enforcement officials, citing the statement by this Court in *Cleary* v. *Bolger*, 371 U. S. 392, 394, that the Commission was an agency which "worked in close cooperation with the Customs Service in matters of law enforcement on the waterfront". The record is bare of any evidence of cooperation between the Commission and federal law enforcement officers in *this* case. And a *general* policy of cooperation between state and federal law enforcement agencies obviously does not make petitioners' claimed fears of federal incrimination reasonable.

POINT II

Petitioners did not have a constitutional right to refuse to testify upon the ground that the Commission's grant of immunity from prosecution extended only to state, and not to federal, crimes.

A. The decision by this Court in *Malloy* v. *Hogan* (No. 110 this Term) concerning the applicability of the Fifth Amendment to the states does not control the instant case.

In its order granting certiorari herein (R. 242), the Court has directed that the instant case be argued immediately following *Malloy* v. *Hogan* (No. 110 this Term). The *Malloy* case presents the question whether the self-incrimination clause of the Fifth Amendment to the United

States Constitution is applicable to the States through the due process clause of the Fourteenth Amendment. Assuming for the purposes of argument that the Court should decide in *Malloy* v. *Hogan*, that the Fifth Amendment is applicable to the States, that would be the beginning, rather than the end, of inquiry in this case. For whether the Fifth Amendment permits a witness to refuse to testify upon the ground of incrimination under the laws of another jurisdiction is an independent question that involves entirely different competing considerations, as hereinbelow discussed in subdivisions B and C of this Point.

Heretofore, this Court has held in a long line of decisions that the Fifth Amendment does not permit a federal witness to refuse to testify on the ground of incrimination under state laws. *Brown* v. *Walker*, 161 U. S. 591 (federal witness given federal immunity); *Hale* v. *Henkel*, 201 U. S. 43 (same); *United States* v. *Murdock*, 284 U. S. 141 (no immunity granted, only state incrimination claimed by federal witness); *Hutcheson* v. *United States*, 369 U. S. 599 (no immunity granted, state criminal proceeding pending against federal witness). Particularly noteworthy is the fact that the first Mr. Justice Harlan, who dissented from the decision by this Court in *Twining* v. *New Jersey*, 211 U. S. 78 (adverse comment on state criminal defendant who did not testify), that the Fifth Amendment was not applicable to the States through the Fourteenth Amendment, concurred nonetheless with the decisions in *Brown* and *Hale* that a federal witness could not, under the Fifth Amendment, refuse to testify because of state incrimination. Conversely, this Court has repeatedly held from the beginning that a state witness who has been granted immunity from state prosecution cannot refuse to testify upon the ground of federal incrimination. *Jack* v. *Kansas*, 199 U. S. 372 (Harlan, J., concurring); *Knapp* v. *Schweitzer*, 357 U. S. 371; *Mills* v. *Louisiana*, 360 U. S. 230.

Hence, it has never been thought that the Fifth Amendment protects a witness against incrimination under the laws of another jurisdiction. So, even assuming the applicability of the Fifth Amendment to the States, it in no respect follows that petitioners in this case could refuse to testify upon the ground that they would be incriminated under federal law. That is an independent question to which we now turn.

B. The Court should adhere in this case to its previous decisions that a state witness who has been granted immunity from state prosecution cannot refuse to testify upon the ground of federal incrimination.

The people of this Country through their duly elected representatives in the State legislatures have made the policy judgment that the efficacy of the States' investigative powers requires that a witness who has been conferred with immunity from prosecution should not be excused from giving testimony because of claimed incrimination under the laws of another jurisdiction. This policy judgment is embodied in the many state immunity statutes which have been enacted against the backdrop of established constitutional doctrine that a state immunity witness cannot refuse to testify upon the ground of foreign incrimination.

Petitioners seek to have the Court override this policy judgment and in effect nullify state immunity statutes. For it is perfectly plain in view of the presently pervasive nature of federal law that a state immunity witness could avoid testifying by the simple expedient of claiming federal incrimination. This fact has been explicitly recognized by the Court, itself, in *Knapp* v. *Schweitzer, supra,* at pages 378-9, wherein it was stated: "In these days of the extensive sweep of such federal statutes as the income tax law and the criminal sanctions for their evasions, investigation under state law to discover corruption and misconduct, generally, in violation of state law could easily be thwarted

if a State were deprived of its power to expose such wrongdoing with a view to remedial legislation or prosecution." Indeed, in this case, the court below held that the recently-enacted New Jersey statute expanding the privilege against self-incrimination to include federal incrimination was not intended to be applicable in the present situation because otherwise the immunity provisions of the Waterfront Commission Act would be nullified (R. 230-231). Hence, nothing less is involved in this case than the continued enforceability of every state immunity statute in the Country.

The immunity statute has an ancient and respectable lineage. "Such statutes . . . have for more than two centuries been the expedients resorted to for the investigation of many offenses, chiefly those whose proof and punishment were otherwise impracticable because of the implication in the offense itself of all who could bear useful testimony . . . the tradition of it as a lawful method of annulling the privilege against self-incrimination is unquestioned in English history." 8 Wigmore, *Evidence*, pages 492-3 (1961 ed. McNaughton revision). "[T]he constitutional enshrinement of this particular privilege [self-incrimination] in the United States leaves no other method available, and the frequent and increasing resort to it seems to show how necessary it is found to be. Bribery and other forms of political corruption have called chiefly for its aid; and, next, gambling, liquor selling, sundry frauds and monopolistic extortions; moreover, investigations upon all subjects by legislative committees are commonly thus facilitated." 8 Wigmore, *supra*, pages 496-7. In this Country the immunity statute knows no sectional limitations. It is in force in Georgia and Mississippi as well as New York, in Alaska and California as well as Massachusetts. 8 Wigmore, *supra*, pages 495-507, footnote 11.

Surely, the Court will be slow in overriding as a violation of due process a policy judgment that has prevailed

so widely and for so long among the people of this Country. Indeed, it is practically self-contradictory to say that such a policy judgment violates due process as being not "consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions and not infrequently are designated as the 'law of the land' ". *Hebert* v. *State of Louisiana*, 272 U. S. 312, 316. In illuminating contrast, this Court in *Mapp* v. *Ohio*, 367 U. S. 643, was dealing with police conduct which, by hypothesis, was contrary to our basic scheme of ordered liberty because the police conduct involved therein was unlawful in that it was in violation of the laws relating to arrests and searches that the States have universally adopted.

As against the vital interest of the States in the continued enforceability of state immunity statutes, which are indispensable to effective law enforcement, the fear of federal prosecutions by state witnesses is chimerical. It is true that the state immunity witness in *Feldman* v. *United States*, 322 U. S. 487, subsequently found himself the subject of a federal prosecution. But as Mr. Justice Black observed in his dissenting opinion in *Feldman*, at p. 495: "Never since the Bill of Rights was adopted, until today, has this Court sustained a single conviction for a federal offense which rested on self-incriminatory testimony forced from the accused." And the Second Circuit stated in its decision in *Feldman* (136 F. 2d 394, 398) that "It seems surprising that neither the researches of counsel nor those of this court have uncovered any precise authority."

In other words, the federal prosecution involved in *Feldman* wherein use was made of state immunity testimony was a legal sport that has not repeated itself. Indeed, the only other decision that has been found involving the use of state immunity testimony in any way in a federal prosecution is *United States* v. *Bonanno*, 178 F. Supp. 62 (S.D.N.Y. 1959). There, a motion by fed-

eral defendants to suppress the state immunity testimony of defendants and also of unindicted co-conspirators was denied, with the observation, however, that the prosecution intended to use only the testimony of the unindicted co-conspirators, and not the testimony of the defendants, and further that no question of the "fruit of the poisonous tree" was involved since there was no indication that the prosecution was going to use information which it had obtained as a result of the state immunity testimony (178 F. Supp. at p. 68, footnote 13).

Surely, the spectre of *Feldman*—and it is nothing more than that—is a slim basis upon which to destroy state immunity statutes. And surely, at the very least, the harm should not be anticipated and the Court should not reach out gratuitously to decide a constitutional question of such fundamental importance. The time to reach that question is *when and if* petitioners' testimony is sought to be used against them in a subsequent federal prosecution.

The Court accordingly should adhere to its previous decisions that a state immunity witness cannot refuse to testify upon the ground of federal incrimination.

C. If the Court should be of the view that petitioners must be protected against federal incrimination before their testimony may be compelled, then the Court should overrule *Feldman* which permits the use of state immunity testimony in a federal prosecution.

The spectre of *Feldman* overhangs this case. We believe that the Court should not vitiate state immunity statutes upon the basis of harm (a subsequent federal prosecution in which petitioners' state immunity testimony is used against them) which may not—and in overwhelming probability will not—ever occur. But if the Court believes that the Constitution requires that petitioners be protected against the possible harm ensuing

from federal incrimination before petitioners' testimony may be compelled, then the Court should properly consider whether such harm may be constitutionally imposed at all. For certainly there is no necessity to nullify state immunity statutes if the harm feared can never permissibly eventuate. Compare, for example, those decisions holding that, upon proof that the statute of limitations has run on the crime in question, the witness may be compelled to give testimony that otherwise would be incriminatory. E.g., *Moore* v. *Backus*, 78 F. 2d 571, 577 (7th Cir. 1935).

Thus, if the Court believes that petitioners must be protected against federal self-incrimination before their testimony may be compelled, then the Court should hold in this case that the Fifth Amendment prohibits the use, directly or indirectly, of petitioners' testimony in any federal prosecution. Such a decision involves of course overruling *Feldman*.

Feldman involves a triad of interests—the interest of the States in the efficacy of their investigative powers; the interest of the state witness not to federally incriminate himself; and the interest of the Federal Government in the punishment of federal crimes. The most reasonable accommodation of these competing interests is to require the state witness to testify pursuant to the grant of state immunity but to prohibit the use of his immunity testimony, directly or indirectly, in any federal prosecution against him.

This accommodation is the most reasonable because it protects the state immunity witness and at the same time is consonant with the constitutional distribution of powers as between the States and the Nation. The state immunity witness is protected because his testimony cannot be used against him, directly or indirectly. This accommodation is consonant with the constitutional distribution of powers between the States and the Nation because the primary

duty of enforcing criminal justice rests upon the States in our form of federalism. As this Court stated in *Knapp* v. *Schweitzer, supra*, 357 U. S. at page 375:

> "The essence of a constitutionally formulated federalism is the division of political and legal powers between two systems of government constituting a single Nation. The crucial difference between federalisms is a wide sweep of powers conferred upon the central government with a reservation of specific powers to the constituent units as against a particularization of powers granted to the federal government with the vast range of governmental powers left to the constituent units. The difference is strikingly illustrated by the British North America Act, 1867, 30 Vict., c. 3, and the Commonwealth of Australia Constitution Act, 1900, 63 & 64 Vict., c. 12. It is relevant to remind that our Constitution is one of particular powers given to the National Government with the powers not so delegated reserved to the States or, in the case of limitations upon both governments, to the people. Except insofar as penal remedies may be provided by Congress under the explicit authority to, make all Laws which shall be necessary and proper for carrying into Execution, the other powers granted by Art. I, § 8, the bulk of authority to legislate on what may be compendiously described as criminal justice, which in other nations belongs to the central government, is under our system the responsibility of the individual States."

Indeed, to nullify state immunity statutes so as not to interfere with the prosecution of federal crimes would be to reverse the distribution of powers as between the States and the Nation contemplated in the United States Constitution. Compare *Elkins* v. *United States*, 364 U. S. 206 (illegal state search and seizure evidence inadmissable in federal prosecution).

In *Elkins* v. *United States, supra,* 364 U. S. at page 222, it was stated: "[T]his Court has seldom shown itself unaware of the practical demands of effective criminal investigation and law enforcement." We respectfully call upon the Court to redeem the promise. We ask that the Court not render a decision in this case which would have the effect of nullifying the state immunity laws that are in existence throughout this country.

POINT III

Petitioners' other contentions respecting the within civil contempt judgments (that they were entitled to a jury trial; that they were entitled to a trial on the issue of their good faith; that they were entitled to know what information was contained in the Commission's files; and that they were denied the equal protection of the laws) are without merit.

1. Petitioners contend that, before they could be adjudged guilty of civil contempt, it was constitutionally required that they be given a jury trial. In *Green* v. *United States,* 356 U. S. 165, 183, sustaining a *federal criminal* contempt conviction in the absence of trial by jury, this Court stated: "The statements of this Court in a long and unbroken line of decisions involving contempts ranging from misbehavior in court to disobedience of court orders establish beyond peradventure that criminal contempts are not subject to jury trial as a matter of constitutional right." It accordingly cannot be reasonably contended that jury trials are constitutionally required in *state civil* contempts.

2. Petitioners contend that they were constitutionally entitled to a trial upon the issue of their good faith. Petitioners assert that "they had no contemptuous intent and that their resistance to the Waterfront Commission's interrogation was grounded in good faith upon valid legal

considerations" (petitioners' brief, p. 63). In other words petitioners claim that they cannot be compelled to testify unless it is first proven that they are possessed of some bad motive.

Petitioners' motives for refusing to testify are immaterial in a civil contempt proceeding. Thus, in *McComb* v. *Jacksonville Paper Co.*, 336 U. S. 187, this Court held that good faith is not a defense in a federal civil contempt proceeding for violation of an injunction order. Indeed, this Court has held in a criminal prosecution for contempt of Congress, pursuant to 2 U.S.C., § 192, which makes it a misdemeanor "wilfully" to refuse to answer questions or to produce papers, that good faith reliance upon advice of competent counsel was not a defense since moral turpitude was not involved and that the only question was whether the refusal to obey was deliberate, that is, not inadvertent. *Sinclair* v. *United States*, 279 U. S. 263, 299.

Here, of course, petitioners' continued refusal to testify is deliberate. Besides, petitioners, who are free on bond pending this Court's decision, may at any time purge themselves of civil contempt by testifying and it is difficult to see what good faith claim petitioners could make for continuing in their refusal to testify in the event this Court should decide that petitioners refused to testify without legal justification.

3. Petitioners (who are not licensed by the Commission) contend that they were denied due process in that they were unable to make a rational judgment with respect to the necessity or advisability of claiming the privilege against self-incrimination because of the "refusal of the Commission to apprise petitioners of the damaging information against them (if any) on the subject of supposed 'waterfront crime', the like refusal to allow confrontation in cross-examination of accusatory witnesses and the concomitant denial of all the petitioners' requests for discovery" (petitioners' brief, p. 75).

The court below stated respecting this argument: "We know of no rule, constitutional or otherwise, which provides that when, as here, the subject matter of the inquiry and the pertinency thereto of questions have been made clear to a witness, he is entitled to be given further information before deciding whether to exercise his privilege against self-incrimination. If the Commission were thus compelled to disclose the contents of its files, then the whole investigative process would be subject to scrutiny before the investigation had even gotten under way, and in most cases the investigation would be thwarted" (R. 238).

The reasoning of the court below on this question comports with this Court's decision in *Hannah* v. *Larche*, 363 U. S. 420, where the constitutional question involved was "Whether persons whose conduct is under investigation by a governmental agency of this nature [Civil Rights Commission] are entitled, by virtue of the Due Process Clause, to know the specific charges that are being investigated, as well as the identity of the complainants, and to have the right to cross-examine those complainants and other witnesses" (363 U. S. at pp. 441-2). The Court answered this question in the negative, stating that "the investigative process could be completely disrupted if investigative hearings were transformed into trial-like proceedings, and if persons who might be indirectly affected by an investigation were given an absolute right to cross-examine every witness called to testify" (363 U. S. at p. 443), and that, "We think it is fairly clear from this survey of various phases of governmental investigation that witnesses appearing before investigating agencies, whether legislative, executive, or judicial, have generally not been accorded the rights of apprisal, confrontation, or cross-examination" (363 U. S. at p. 449).

4. Finally, petitioners contend that they were discriminatorily denied, in violation of the equal protection of the laws, the benefits of the New Jersey Statute defining privi-

lege against self-incrimination to include federal crimes. The Court below held as a matter of general statutory construction that this statute, which was recently enacted in 1960, was not intended to be applicable in a situation where, as here, the witness had been granted immunity pursuant to the explicit immunity provisions of the Waterfront Commission Act. Since this decision involves a question of general statutory construction which will have uniform application, and is in no wise confined to petitioners, no question of the equal protection of the laws is presented. E.g., *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541 (New Jersey statute which makes holder of less than 5% of outstanding shares of corporation stock if unsuccessful in stockholder's derivative action liable for all expenses, including attorneys' fees, and requires security for their payment as a condition of prosecuting action, unless the stock has a market value in excess of $50,000 does not violate the equal protection of the laws). Moreover, contrary to petitioners' contentions, it is not at all clear that the same result would not obtain with respect to other New Jersey immunity statutes.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the civil contempt judgments herein should be affirmed in all respects.

Respectfully submitted,

WILLIAM P. SIRIGNANO,
General Counsel of the Waterfront
Commission of New York Harbor,
Attorney for Petitioner,
15 Park Row,
New York 38, N. Y.

Of Counsel:
IRVING MALCHMAN,
Assistant to the General Counsel.

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